IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 793

L. P. STEUART & BRO., INC., *Petitioner,*

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

RENAH F. CAMALIER,
FRANCIS C. BROOKE,
National Press Building,
Washington, D. C.
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner L. P. Steuart & Bro., Inc., a corporation (hereinafter sometimes called the plaintiff) respectfully presents this petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the District of Columbia, rendered February 18, 1944, which affirmed the judgment of the District Court of the United States for the District of Columbia, in favor of respondents (hereinafter sometimes called the defendants) and against petitioner (R. 71).

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

The plaintiff, a retail fuel oil dealer, filed a complaint in the District Court of the United States for the District of Columbia (R. 1) seeking to enjoin the enforcement of a "suspension order" issued by the Office of Price Administration. Appropriate motions were filed for a temporary restraining order and for a preliminary injunction. A temporary restraining order (R. 53) was issued by consent and from time to time has been extended and is now in effect.

The judgment of the District Court (R. 62) dismissed the complaint and the judgment of the Court of Appeals affirmed that of the District Court (R. 71). As recited in the judgment of the District Court, there were no material issues of fact.

The plaintiff for many years has been engaged in the retailing of fuel oil (R. 2). In the course of its fuel oil business, it has invested approximately $750,000.00 in the various facilities necessary to the conduct of such a business. In compliance with recommendations of the Petroleum Administrator for War, it expended $50,000 to increase its storage, unloading and delivery facilities. Due to this fact and to the failure of its competitors so to do, plaintiff is better able to serve the retail purchasing public including the Government than are its competitors (R. 2).

In February of 1943, the Office of Price Administration issued Procedural Regulation 4 (Fed. Reg. 1744). Because of the fact that the provisions of Procedural Regulation 4 will be frequently referred to in this petition and brief, the regulation is set forth at length in the Record at Pages 13-22, inclusive. The Regulation prescribes the procedure to be followed in issuing suspension orders (Section 1300.151, R. 14). A suspension order is defined by Section 1300.180(f) (R. 22) as follows:

> " 'Suspension order' means an order which regulates or prohibits, for a period, the sale, transfer, delivery or other disposition or the acquisition or use of com-

modities or facilities, *and which is issued against a person who has acted in violation of a rationing order or regulation.*" (Italics supplied.)

The Regulation provides for the manner of instituting proceedings, Section 1300.152 (R. 14), a statement of charges and notice of hearing, Section 1300.153 (R. 14), a Hearing Commissioner, Section 1300.154 (R. 14), conduct of hearings, right of respondents to counsel, and rules of evidence, Section 1300.156 (R. 15), subpoenas, Section 1300.157 (R. 15), witnesses, Section 1300.158 (R. 16), contempt, Section 1300.159 (R. 16), briefs, Section 1300.163 (R. 17), orders of Hearing Commissioners, Section 1300.165 (R. 17), appeals to the Hearing Administrator, Section 1300.170—1300.175 (R. 19-20). As above shown by its definition, a suspension order is issued against a person who *has* acted in violation of a ration order or regulation. Section 1300.165 (R. 17) provides for a determination by a Hearing Commissioner that the respondent *has violated* a ration regulation before he issues a suspension order, and provides that he shall make written findings of fact and conclusions of law.

In October 1942, the Office of Price Administration issued Ration Order 11 (7 Fed. Reg. 8480) which deals with the marketing and use of fuel oil.

Pursuant to the provisions of Procedural Regulation 4, suspension order proceedings were instituted against the plaintiff in Augut, 1943, (R. 3). The specification of charges (R. 24) alleges 227 violations of Ration Order No. 11, which were grouped by both the Hearing Commissioner and the Hearing Administrator as follows (R. 32, R. 43):

1. The purchase of fuel oil without transferring rationing evidence.
2. The sale of fuel oil without requiring the delivery of valid ration evidence.
3. The failure to comply with the requirements of the regulation with respect to the keeping of records.

The alleged violations occurred during the period from November 3, 1942, to June 2, 1943. The Hearing Commissioner sustained the charges that the plaintiff had received fuel oil without transferring proper rationing evidence but found the plaintiff not guilty of the other charges (R. 32-39). On appeal, the Hearing Administrator found the plaintiff guilty of all of the charges (R. 41 *et seq.*), and at the conclusion of his opinion entered the following order (R. 50-51):

> "A. From January 15, 1944 to December 31, 1944, both dates inclusive, respondent shall not, directly or indirectly, receive delivery of fuel oil for resale or transfer to any consumer, nor shall respondent transfer fuel oil to any consumer, provided that (1) if respondent on or before January 10, 1944 delivers to the District Enforcement Attorney of the District of Columbia District Office a duly verified list of the names and addresses of all consumers to whom respondent sold and delivered fuel oil from October 21, 1941 through October 21, 1942, and (2) if respondent surrenders to the District of Columbia District Office before January 15, 1944 all void or expired ration evidences (or delivery receipts) then in its possession, then and in that event respondent may from January 15, 1944 to December 31, 1944, both dates inclusive, transfer fuel oil to any consumer to whom it transferred fuel oil between October 21, 1941 through October 21, 1942, both dates inclusive, and may receive deliveries of sufficient quantities of fuel oil for purposes of resale and transfer to such consumers.
>
> "B. Within thirty (30) days after the receipt of a copy of this order, respondent shall render an accounting to the Director of the District of Columbia District Office (1) for all fuel oil transferred or received by the respondent during the period from 12:01 a. m., October 22, 1942, to the date of such accounting, (2) for all coupons, ration evidences (or delivery receipts) received by or surrendered by the respondent during said period, and (3) showing the quantity of fuel oil (by physical inventory), and coupons, ration evidences (or delivery receipts), on hand and on deposit in its ration bank account as of the date of said accounting.

"C. If at any time during the period of this suspension the Petroleum Administrator for War or his duly authorized agent certifies to the Director of the District of Columbia District Office that the fuel oil needs of the District of Columbia or the area served by respondent cannot be met by the supplies and facilities of other suppliers and dealers in this area in addition to those of respondent's as herein restricted, and that it is, therefore, essential to the welfare of the community that the provisions of this order should be modified, and the District Director joins with respondent in a petition requesting such modification, an order of modification may be entered either by the Chief Hearing Commissioner of Region II or the Hearing Commissioner who heard the case below removing the restrictions herein imposed to the extent such action is shown to be necessary to the welfare of the community or the war effort.

"D. Any terms used in this suspension order that are defined in Ration Order No. 11, shall have the meaning therein given to them.

If the suspension order is enforced, the plaintiff will suffer irreparable damage. There is an annual turnover of 15 to 20 percent in the plaintiff's customers, with the result that the enforcing of the order according to its terms will mean that, instead of being able to sell the amount of oil or to the number of customers to whom the plaintiff sold in the year October 21, 1941 to October 21, 1942 (hereinafter sometimes referred to as the pre-rationing year), the plaintiff will be at best able to supply only a part of them (R. 10). A large percentage of the plaintiff's sales have been for cash. During the pre-rationing year no records were required to be kept, or were kept, which would show who these cash-customers were. Consequently, the plaintiff cannot comply literally with the terms of the order, and a large number of persons who were cash customers in a pre-rationing year would be lost to the plaintiff. The expenditure for storage and handling of fuel oil made pursuant to recommendations of the Petroleum Ad-

ministrator for War will be wasted and of no benefit to the War effort if the suspension order is enforced. During the last few days prior to the filing of the complaint, the Government purchased 250,000 gallons of fuel oil from the plaintiff. By reason of the fact that the Government was not a customer of the plaintiff in the pre-rationing year, plaintiff will not be able to supply the Government if the order is enforced.

Paragraph 7 of the Complaint (R. 6-8) sets forth the plaintiff's charge of the invalidity of the suspension order proceedings and of the suspension order itself. The claim is there made that the suspension order hearings and the suspension order are not authorized by any statute or valid executive order, proclamation or regulation. The claim is also made that Title III of the Second War Powers Act, Act of March 27, 1942 c 199, Title III (56 Stat. 177) U.S.C.A., Title 50, App. 633[1] provides the exclusive remedies for the

[1] Title III of the Second War Powers Act amended Subsection (a) of Section 2 of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236). The concluding sentence of Section 2 (a) (2) as finally amended by Title III of the Second War Powers Act, reads as follows:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

Section 2(a)(5) provides as follows:

> "Any person who willfully performs any act prohibited, or willfully fails to perform any act required by any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

Section 2(a)(6) reads in part as follows:

> "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdic-

enforcement of the plaintiff's duties created by the said statute or by any rule, regulation or order therein; and that if the suspension order is enforced, the plaintiff will have been penalized for alleged violations of regulations of the Office of Price Administration issued pursuant to the Second War Powers Act, without proceedings having been brought in the District Court of the United States and without the plaintiff's having been found guilty by any such court.

The answer of the defendants denied the averments of Paragraph 7 of the complaint and claimed that the suspension order was a valid exercise of the allocation power granted to the President of the United States by Title III of the Second War Powers Act of 1942 (56 Stat. 176) 50 U. S. C. App. section 633),[1] and delegated to the Office of Price Administration. (R. 57).

The complaint averred, and the points were pressed in the courts below, that the suspension order was invalid because it exceeded the authority of the Office of Price Administration under War Production Board Directive No. 1 (7 Fed. Reg. 2719, 2720), and that the suspension order was void because it forced a discrimination between the plaintiff's old customers and others in violation of Ration Order 11. However, the question on which certiorari is requested is whether or not the Office of Price Administration has any statutory authority to issue suspension orders of the type here in question.

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tion of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder whether heretofore or hereafter issued. * * *"

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C. 347(a). The judgment of the United States Court of Appeals of the District of Columbia on which review is sought, was entered on February 18, 1944.

QUESTION PRESENTED.

Does the Office of Price Administration have statutory authority under Title III of the Second War Powers Act to entertain suspension order proceedings prescribed by Procedural Regulation 4 and followed in the instant case and to issue suspension orders?[2]

It is to be noted that the petitioner does not contend and has never contended in this case that Congress was without constitutional power to grant the President authority to do the acts sought to be enjoined in this action. Although this contention has been made in similar cases, it is not made here. The petitioner concedes that Congress could have granted such authority and the sole question relates to the intent of Congress, not its power.

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[2] *Brown* v. *Wilemon* (C. C. A. 5th) 139 F. 2d 730, reversing *Wilemon* v. *Brown* (Texas) 51 F. Supp. 978; *Perkins* v. *Brown* (Georgia) 53 F. Supp. 176; *Joliet Oil Corporation* v. *Brown* (Illinois), —— F. Supp. ——, unreported; *Panteleo* v. *Brown* (New York) —— F. Supp. ——, unreported; *Kotsos* v. *Ivins* (Utah) —— F. Supp. ——, unreported, support the theory that Title III of the Second War Powers Act authorizes the issuing of suspension orders.

Sims v. *Talbert* (South Carolina), 52 F. Supp. 688, and *Wilemon* v. *Brown, supra*, reversed by *Brown* v. *Wilemon, supra*, hold that suspension orders are void and are not authorized by the statute. *B. Simon Hardware Co.* v. *Nelson* (District of Columbia) 52 F. Supp. 474, holds that a suspension order is not authorized when used as a penalty. The District Court in the present case seeks to distinguish the present case from *B. Simon Hardware Co.* v. *Nelson* (R. 61).

In *Gallagher's Steak House, Inc.* v. *Bowles* the United States District Court for the Southern District of New York sustained the validity of the suspension order, but that case is now being considered by the Circuit Court of Appeals of the Second Circuit.

REASONS FOR ALLOWANCE OF WRIT.

Petitioner submits the following reasons for the allowance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia:

1. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction and application of a statute of the United States, which has not been, but should be, settled by this Court.[2]

2. The United States Court of Appeals for the District of Columbia has decided a federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that writ of certiorari issue to the United States Court of Appeals for the District of Columbia, and submits herewith its brief in support of this petition.

Respectfully submitted,

RENAH F. CAMALIER,
FRANCIS C. BROOKE,
Attorneys for Petitioner.

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No. ———.

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v.

CHESTER BOWLES, Administrator, Office of Price Administration, et al.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Court of Appeals is not yet reported but is set forth on Pages 66-71, inclusive, of the Record. The opinion of the District Court is not reported but appears on Pages 59-62 of the Record.

B.

JURISDICTION.

I.

The jurisdiction of this Court is sustained by Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 347 (a).

II.

The date of the judgment to be reviewed is February 18, 1944 (R. 71).

III.

The grounds on which jurisdiction of this Court is invoked are set forth in the reasons for the allowance of writ in the petition.

IV.

STATEMENT OF THE CASE.

The case has been stated under heading "Summary and Short Statement of Matter Involved" in the petition.

SUMMARY OF ARGUMENT.

It must be conceded that Title III of the Second War Powers Act does not expressly give to the President the power to issue suspension orders based upon past violations of ration orders or regulations. The opinions of the Courts below, and those decisions of other Courts sustaining the validity of suspension orders, are based on the view that the power to "allocate" scare materials includes the power to issue suspension orders predicated solely upon past violations of offenders against ration regulations. They urge that a dealer is an "agent" or "licensee" whose agency or license may be revoked for violation.[1] They base their construction in part upon the theory of substantial reenactment by Congress after an administrative interpretation.[2]

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[1] "Though no license was issued, such was the effect of the arrangement; and by acceptance of it the filling station operators impliedly agreed to abide by the regulations. They became in effect the appointees of the Government to assist in the administration of the rationing. If any of them should prove untrustworthy or noncooperative, we think it a fair exercise of administrative power to withdraw from such, temporarily or permanently, the privilege of distributing the allocated and rationed material." *Brown* v. *Wilemon*, 139 F. 2d 730, 731-32. See opinion of Bailey, J. (R. 59, 61.)

[2] *Perkins* v. *Brown*, 53 F. Supp. 176, 180-81. See opinion of United States Court of Appeals for the District of Columbia (R. 67, 68-69).

Those decisions which deny that the Executive has the authority under the statute in question characterize them as penalties inflicted in quasi-judicial proceedings, and adhere to the view that neither the proceedings nor the penalty are authorized.[3] They reject the theory that suspension orders have been sanctioned by a reenactment of the statute after an administrative interpretation.[4]

The Petitioner urges that the decisions upholding suspension orders are fallacious because:

(1) Dealers are not licensees or agents of the Government, and even if they were, the right in the Executive to suspend or reject the agency or license is not to be implied;

(2) Even if there were a right to revoke an agency or license, there is no implied right to penalize or punish under the guise of the exercise of a licensing power.

The Petitioner also urges that both the legislative history and language of Title III of the Second War Powers Act destroy any theory that Congress ratified an administrative interpretation.

ARGUMENT.

I.

Dealers Are Not Licensees or Agents of the Government.

Section 2 (a) (6) of Title III of the Second War Powers Act[5] gives to the District Courts of the United States jurisdiction

> "of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder . . ."

[3] *Sims* v. *Talbert*, 52 F. Supp. 688, 693. "It is pure fiction to say that the suspension order is not punitive as to Sims."

[4] *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474.

[5] Act March 27, 1942, c. 199 (56 Stat. 176) U. S. C. A. Title 50 App. Sec. 633.

In view of the fact that the Act provides for both civil and criminal enforcement through the Courts, it would appear under the usual rules of statutory construction that those means were exclusive, especially since the phrase "all civil actions" was employed.

It is notable that none of the decisions characterizing a dealer as an agent or licensee cite authority for their designation. The Act itself makes no mention of the licensing power. Neither does it refer to any agency. These decisions generally cite two reasons for their conclusions. The first is that the legislation was enacted during wartime and must be broadly construed. See *Perkins* v. *Brown*, 53 F. Supp., 176, 179. The other reason is an allegation that the Government has the power to buy and sell and that if, instead of so doing or setting up its own buying and selling agencies, it chose to allow dealers to remain in business, the dealers' activities became a privilege which could be withdrawn as to any one dealer when the Executive was satisfied that that dealer was an offender.

The proposition that the Act can be loosely construed is denied by its history. The act of June 28, 1940 (54 Stat. 676) had been administered for ten months before the Priorities and Allocations Act of 1941 (55 Stat. 236) was introduced. The language of the Priorities and Allocations Act was suggested by the Office of Production Management which had been administering the prior act. See Hearings, House Committee on Naval Affairs, April 28, 1941, on H. R. 4534, Pages 990 *et seq.* The language suggested was practically identical with that of the Priorities and Allocations Act as it passed Congress. In none of the hearings and reports is there any mention of a licensing power or agency.[6]

[6] Hearing on H. R. 4534 before House Committee on Naval Affairs, April 28, 1941; House Report No. 460, 77th Cong., 1st Sess.; Hearings, Senate Committee on Military Affairs on H. R. 4534, May 14, 1941; Senate Report No. 309, 77th Cong., 1st Sess.

The Priorities and Allocations Act of 1941 had in turn been administered for more than six months before the Second War Powers Act was introduced. The language of the allocation sentence was practically unchanged; but criminal and civil proceedings were requested by the Attorney General and provided in the Act. Title III of the Second War Powers Act cannot, therefore, be characterized as hasty wartime legislation. It must be concluded that the licensing power was neither requested nor given.

The proposition that the Act cannot be loosely construed to give a licensing power and that the licensing power was not given is fortified when it is remembered that even in emergencies Congress has been aware of the utility of this power. In Section 5 of the Lever Act, Act of August 10, 1917, c. 53 (40 Stat. 276), Congress expressly gave the President the power to license the dealing in necessaries. Further, in the Emergency Price Control Act of 1942 which was before Congress at the same period of the present emergency as was the Second War Powers Act, Congress gave the licensing power to the Office of Price Administration. The history of the Emergency Price Control Act shows that the then Administrator and the then General Counsel of the Office of Price Administration recognized not only the utility of the licensing power but the necessity of express provision for it in the statute. They recommended a licensing power before the House Committee on Banking and Currency. When the bill as it passed the House was silent as to licensing, they appeared before the Senate Committee on Banking and Currency and urged that the licensing power be included. The Act, as passed, does include the licensing power; but the revocation of license is surrounded by safeguards, and is reserved to the courts.

Neither can a licensing power be based on an implied power in the Executive to buy and sell scarce commodities. This was recognized by the General Counsel of the Office of Price Administration at the time the Emergency Price Control Act was before Congress. He devoted several pages

of his brief filed with the Senate Committee on Banking and Currency to the proposition that the power to buy and sell must be expressly given, and demonstrated that previous legislation failed to give that power. See Hearings, Senate Committee on Banking and Currency, 77th Cong., 1st Session, on H. R. 5990, 239, 232 et seq. It is further to be noted that the Emergency Price Control Act did give the Office of Price Administration power to buy and sell upon certain contingencies and subject to certain conditions.

The importance of the fact that Congress provided for licenses and revocations in the Emergency Price Control Act, but did not do so in the Second War Powers Act, cannot be too strongly stressed. To hold that the power to license and revoke licenses is vested in the Executive under Title III of the Second War Powers Act, not only can, but has, resulted in a perversion of the congressional intent which has already been noticed by Congress. On November 15, 1943, the House of Representatives Select Committee to Investigate Executive Agencies issued a report,[7] which disclosed that instead of bringing revocation proceedings in the courts for price violations, the Office of Price Administration adopted the device of inserting in their ration rules and regulations provisions prohibiting the dealers in rationed commodities from selling above the ceiling price. When such a dealer violated the ceiling price, no court proceedings were instituted against him to revoke his license under the Emergency Price Control Act, but the Office of Price Administration would issue a suspension order under Procedural Regulation 4 on the ground that the violation of a ceiling price was *ipso facto* a violation of the ration rules and regulations. As disclosed by the report, during a five-month period, 392 suspension orders were issued based solely on price violations, while during that same period, and one month beyond, only ten license suspension proceedings had been instituted in the courts.

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[7] Second Intermediate Report of the Select Committee to Investigate Executive Agencies, House Report No. 862, 78th Cong., 1st Sess.. Pages 18-19.

II.

Even if Dealers Were Licensees, There is no Power Given by the Act to Revoke Their Licenses.

Statutes giving the right to suspend the doing of business are to be strictly construed. *Wallace* v. *Cutten*, 298 U. S. 229. *United States ex rel Daly* v. *Macfarland*, 28 App. D. C. 552. The decisions cited by the Court of Appeals in support of its conclusions are those where the right to suspend was expressly given.[8] Where Congress in companion legislation, namely, the Emergency Price Control Act of 1942, has set forth in detail the manner of revocation of a license, it would strain construction to hold that the right in the Executive to revoke would be implied. See *United States ex rel Daly* v. *Macfarland, supra.*

III.

Even if There Were a Right to Revoke an Agency or License, There is no Implied Right to Penalize Under the Guise of the Exercise of a Licensing Power.

Mr. Justice Bailey, who decided the instant case in the District Court, held in *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474, that Title III of the Second War Powers Act does not give to the Executive the power to use a suspension order as a penalty. He distinguishes that case from this by saying that in the one the suspension order was penal and in the other remedial. The only difference between the cases apparent in the opinions is that in the *Simon Hardware* case the word "penalty" was used in the caption of the regulation and the notice of the proceedings. This would seem to place too much significance on the use of a word. No mere exercise of the art of lexicography can

[8] *Wright* v. *Securities & Exchange Commission*, 112 F. 2d 89 (C. C. A. 2d); *Nichols & Co.* v. *Secretary of Agriculture*, 131 F. 2d 651 (C. C. A. 1st); *Nelson* v. *Secretary of Agriculture*, 133 F. 2d 543 (C. C. A. 7th).

alter the essential nature of an act or thing, and if a suspension order is a penalty, failure to call it such does not change its nature. Compare *United States* v. *La Franca*, 282 U. S. 568, 572.

Conceding for the sake of argument the power to license, the inquiry as to whether a revocation of the right to do business is a penalty depends, as was said in *Ex Parte Garland*, 4 Wall. 333, 380, on whether the power to prescribe qualification "has been exercised as a means for the infliction of punishment."

The reasoning adopted in *Brown* v. *Wilemon*, 139 F. 2d, is strikingly similar to that of the Attorney General for Missouri in *Cummings* v. *Missouri*, 4 Wall. 277, 320. There the Court, after demonstrating that the right to pursue a trade is a business right, held that a deprivation or suspension of that right *for past conduct* is a punishment. An analysis of Procedural Regulation 4 and of the proceedings in the instant case shows that they were quasi-judicial in character and were employed for the imposition of a penalty. Procedural Regulation 4 defines a suspension order as one issued against a person "who has acted in violation of a rationing order or regulation." The Hearing Commissioner must find a violation before he can issue a suspension order. A dealer can threaten to violate without being reached by the prescribed proceedings. He may have violated the orders of the Petroleum Administrator for War, the Office of Defense Transportation, and the War Production Board but, under its own regulations, the Office of Price Administration neither attempts to prevent his going into business nor to put an end to his business. He may be convicted of the worst felony with no ill results so far as becoming or remaining a dealer is concerned.

Brown v. *Wilemon*, *supra*, characterizes the tribunals set up by Procedural Regulation 4 as "an elaborate system of quasi-courts." The brief of the Office of Price Administration filed with the House Committee on Banking and Currency recognized the quasi-judicial character of proceed-

ings for the suspension or revocation of a license. In the summary of its brief there appears the following language:

> "However, because it is recognized that the suspension or revocation of a license may involve the exercise of quasi-judicial powers, the proposed statute provides for quasi-judicial hearings in connection with such suspension or revocation. It also provides for review in the emergency court of orders of suspension or revocation, * * *."

See Hearings Before Committee on Banking and Currency, House of Representatives, 77th Cong., 1st Session, on H. R. 5479, superseded by H. R. 5990, Page 340. The report of the Select Committee to Investigate Executive Agencies, at Page 14, characterizes the procedure of the Office of Price Administration as the establishing by the Office of Price Administration of its own judiciary along with prosecuting attorneys and a constabulary.

Congress treats the withdrawal of a priority or allotment as a penalty in the Federal Reports Act of 1942, Act of December 24, 1942, c. 811 (56 Stat. 1078), U. S. C. A. Title 5, Section 139 (f).

The Government, in *Hamner* v. *United States* (C. C. A. 5th), 134 F. 2d 592, 594, argued "that the rationing regulations *create an offense* by imposing as a *penalty* on violators an inability to get more tires."

The Office of Price Administration, instead of seeking an injunction in the courts when the alleged violation were occurring, waited until after the close of the ration year ending June 30, 1943, and then brought its proceedings. Although the present heating season is drawing to a close, there is no intimation at any point in this case that the Petitioner is violating, or during the present heating season has violated, a ration order or regulation.

The Court below cites *Hawker* v. *New York*, 170 U. S. 189; *Wright* v. *Securities and Exchange Commission*, 112 F. 2d 89; *Nichols and Co.* v. *Secretary of Agriculture*, 134 F. 2d 651; and *Nelson* v. *Secretary of Agriculture*, 133 F. 2d

543, in support of its proposition that the suspension order is remedial. In each of those cases, there was a statute expressly giving the right to suspend the doing of business for past misconduct. Legislation may be remedial and yet authorize penal or punitive action, but the authorization must be expressly given. The opinion of Mr. Justice Brandeis in *Wallace* v. *Cutten*, 298 U. S. 229, clearly demonstrates that in a remedial statute the power to suspend or revoke the right to do business *for past misconduct* is not to be implied.

IV.

Congress Did Not Ratify a Practice of Issuing Suspension Orders.

The theory of congressional ratification of an administrative interpretation was rejected in *B. Simon Hardware Co.* v. *Nelson*, 52 F. Supp. 474. The Court of Appeals in the instant case states that the practice of issuing such orders was brought to the attention of Congress when the Second War Powers Act was under consideration. Even the Respondents did not make so strong a statement in their brief in the Court of Appeals. It is true that the Attorney General and the General Counsel for the Office of Price Administration both said that the penalty of withdrawing priorities *could* be invoked, but neither of them said that such a penalty *had* been invoked.[9] The Attorney General

[9] The Attorney General filed a statement with both the Senate and House Judiciary Committees setting forth the purpose and necessity of the Second War Powers Act. The pertinent portion of his statement with respect to Title III reads:

> "Investigations conducted by the Priorities Division of the Office of Production Management indicate violations of priorities and allocations orders are widespread and serious. It is true that there are various administrative sanctions available to the Office of Production Management. Fuel and power might be cut off to a factory violating the priorities order as was done during the World War on several occasions. But administrative sanctions, although highly important, do not provide an adequate remedy in all cases. For example at a time when airplane production is vitally needed, it would not

did infer that administrative penalties were invoked in the last war, but as above shown, *supra*, p. 15, the Lever Act contained the licensing power and gave to the Government the right to buy and sell fuel. It is to be noted that the Attorney General did not refer to suspension orders; and most certainly he did not refer to suspension orders based on past conduct alone. However, even by giving to the remarks of the Attorney General the broadest implications, a ratification cannot be spelled out. There is no showing of ambiguity in the statute itself. The interpretation was not of long standing. See *Iselin* v. *United States*, 270 U. S. 245, 251. Neither can an interpretation supply omissions in the statute. *Wallace* v. *Cutten*, 298 U. S. 229, 237. See *United States* v. *Weitzel*, 246 U. S. 533, 542-543.

CONCLUSION.

A perusal of the complaint (R. 1-13) shows that the theory of the Petitioner's case was a lack of authority on the part of the Office of Price Administration to issue suspension orders predicated upon alleged past violations. The complaint did not seek a judicial review of the actions of the Office of Price Administration, because to have done so would have admitted the validity of suspension order proceedings prescribed by Procedural Regulation 4. Therefore, Petitioner could not, with propriety, raise the issue as to whether the findings of the Hearing Administrator were true or not. The burden of its complaint was that if the suspension order were enforced it would be penalized and punished for alleged violations without having been found guilty by any court. See Paragraph 7 of the complaint

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facilitate war production to curtail the supply of aluminum to an airplane company and thus close the plant.

"The civil and criminal remedies provided are intended to supply the means whereby priorities orders and allocations can be enforced when administrative sanction are not appropriate."

See Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on S. 2208, January 30 and February 2, 1942.

(R. 6-7). The answer of the Respondents (R. 56-58) recognized this as the only issue, and did not allege that the findings of the Hearing Administrator were true or even that they were based upon substantial evidence. The Court of Appeals, during the oral argument, admonished counsel for Petitioner to refrain from going into the issue of the truth or correctness of the findings of the Hearing Administrator. Despite this fact, the opinion pyramids inference upon inference in arriving at its conclusion. It found violations (R. 69). It found that the Petitioner had informed the Hearing Administrator that it "considered its first duty to be the supplying of its customers with oil and that the conformity of the requirements of the rationing system was subordinate thereto" (R. 69). It justifies this finding by the statement, "The language is the Hearing Administrator's. Appellant has not denied its accuracy." The opinion proceeds to interpret the statement as having a more horrendous meaning by saying that it amounted to the Petitioner's deliberate determining, as a matter of general policy, to meet what it considered the needs of its customers whether or not they had rationing evidence. No such inference is justified by the pleadings. Entirely aside from the fact that the issue before the Court precluded the affirmation or denial of every statement made by the Hearing Administrator in his opinion, the reasoning of the Court is fallacious, because it begs the question. The issue was whether the Office of Price Administration had the power to try and punish an alleged offender. The statement that the offenses were heinous does not prove authority. Lynchings are justified on such reasoning.

The bases upon which the decisions upholding suspension orders are predicated, do not exist. It is respectfully submitted that this Court should issue its writ of certiorari and reverse the decision of the lower Court.

Respectfully submitted,

RENAH F. CAMALIER,
FRANCIS C. BROOKE,
Attorneys for Petitioner.